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No. 99-

In The

Supreme Court of the United States

ROBERT SHAW; LARRY BEARLEY; MICHAEL MAHONEY; MYRON BEESON; AND RICHARD S. DAY,

Petitioners,

v.

KEVIN MURPHY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the First Amendment to the United States Constitution grant a state prison inmate an independent and free-standing right to assist another state prison inmate with a pending court case even if the State supplies other forms of legal assistance to the prison inmate?

PARTIES

The Petitioners are Richard S. Day, Director of the Montana Department of Corrections; and Robert Shaw, Larry Bearley, Michael Mahoney, and Myron Beeson, employees of the Montana Department of Corrections.

The Respondent is Kevin Murphy, an inmate at Montana State Prison.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request this Court issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit that the Ninth Circuit Court entered on November 9, 1999.

OPINIONS BELOW

The three-judge panel of the United States Court of Appeals for the Ninth Circuit filed its Opinion on November 9, 1999, and is reported at 195 F.3d 1121 (9th Cir. 1999). (App. 1). The Ninth Circuit Court of Appeals denied a Petition for Rehearing and a Suggestion for Rehearing En Banc on January 7, 2000. (App. 45). The district court filed an unreported Order on September 10, 1997. (App. 18). The magistrate judge issued an unpublished Order and Findings and Recommendation. (App. 28).

JURISDICTION

The Respondent filed claims under 42 U.S.C. § 1983, before the district court, and federal jurisdiction existed under 28 U.S.C. § 1343. On September 23, 1997, the district court granted the Petitioners' Motion for Summary Judgment and denied the Respondent's Motion for Summary Judgment. Respondent filed a Notice of Appeal on October 23, 1997. Appellate jurisdiction existed under 28 U.S.C. § 1291.

On November 4, 1999, the Ninth Circuit Court of Appeals reversed the district court's Order and remanded the case with instructions to enter summary judgment in favor of the Respondent. Petitioners filed a timely Petition for Rehearing with Suggestion for Rehearing En Banc on November 26, 1999. The Ninth Circuit denied the Petition for Rehearing on January 7, 2000. Jurisdiction over the petition for certiorari exists under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides in pertinent part that:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the Unites States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983, provides in pertinent part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

1. This case arose when Respondent attempted to communicate with another Montana State Prison (MSP) inmate, Pat Tracy, about Tracy's pending criminal charges. MSP housed Tracy in the prison's high security compound until officials moved him to the maximum security unit after he assaulted correctional officer Glen Galle. The State charged Tracy with criminal felony assault in state district court, and the state district court therefore appointed counsel to defend Tracy against the criminal charges. (App. 49).

Tracy's place of residence at MSP is significant because the prison is a multi-custody correctional facility. It is physically divided into three separate compounds, the low-security compound or "low side," the high-security compound or "high side," and the maximum security compound. MSP houses death row inmates in maximum security, and it houses inmates there who are so disruptive and violent they cannot live in the general prison

population. MSP incarcerated Respondent in the high security compound at the prison. He worked as an inmate law clerk at the prison, and as such, prison policy authorized Respondent to provide legal assistance to high security inmates, but not to maximum security inmates. MSP did not allow Respondent to enter the maximum security unit.

Tracy nonetheless attempted to summon Respondent to the maximum security unit to consult with Tracy about his pending assault charges. The prison denied Tracy's request to consult with Respondent based upon Respondent's high security classification and Tracy's maximum security classification. The prison instead sent a low security inmate law clerk to confer with Tracy. Tracy rejected the approved clerk's assistance. (App. 49).

On February 16, 1995, Respondent wrote Tracy a letter which read as follows:

> Dear Pat:
>
> How ya (sic) doing? I haven't wrote (sic) before now. I been (sic) busy fighting my charges. Finally got everything taken care of. I can't come up to max anymore. the (sic) lowside clerks go up there now. that's (sic) why I haven't called you out like I used to. I do want to help you with your case against Galle. It wasn't your fault and I know he provoked whatever happened! Don't plead guilty because we can get at least 100 witnesses to testify that Galle is an overzealous guard who has a personal agenda to punish and harass inmates. He has made homo-sexual advances towards certain inmates and that can be brought up into the record. There are petitions against him and I have tried

> to get the Unit Manager to do something about what he does in Close II, but all that happened is that I received two writeups from him myself as retaliation. So we must pursue this out of the prison system. I am filing a suit with everyone in Close I and II named against him. So you can use that too!
>
> Another point is that he grabbed you from behind. You tell your lawyer to get a hold of me on this. Don't take a plea bargain unless it's for no more time.
>
> I seen (sic) Damie for a little while when I was out. I never came over to Butte much. Lenny is living in lower D still and I don't speak to him much. His sister did something to Ted from what I heard. I don't know what. Well I will write again when I get this thing against Galle finished.
>
> Later. . . .
>
> Murph

(App. 46).

Petitioner Shaw, a maximum security unit correctional officer, intercepted and read Respondent's letter. Shaw believed the letter constituted insolence, which the prison defines as "words, actions or other behavior which is intended to harass or cause alarm in an employee;" interfered with a due process hearing, which the prison defines in part as "making a false statement of misconduct against . . . staff that could result in disciplinary action;" and comprised a threat to the security or orderly operation of the institution. Shaw charged Respondent

with three disciplinary rule violations, Rule 009, Insolence; Rule 022, Interference with Due Process Hearings; and Rule 025, Conduct Which Disrupts or Interferes with the Security or Orderly Operation of the Institution.

Petitioner Bearley, a MSP disciplinary hearing officer, thereafter conducted a disciplinary hearing on the charges. Bearley found Respondent guilty of violating Rules 009 and 022. He found Respondent not guilty of violating Rule 025. Bearley gave Respondent a suspended sentence of 10 days detention.

2. Respondent filed a complaint in federal district court against Petitioners on October 24, 1995. He alleged that when the prison disciplined him for the content of his letter to Tracy they violated his First Amendment free speech rights and his right to provide other inmates with legal assistance. He also alleged the discipline violated the rights of other inmates to access the courts because it denied them the assistance of an inmate law clerk, and it violated the Due Process Clause because the disciplinary rules were void for vagueness. He asserted these claims under 42 U.S.C. § 1983, with jurisdiction predicated on 28 U.S.C. § 1343(3).

Following discovery, the parties filed cross motions for summary judgment. A magistrate judge issued findings and recommended that the district court grant Petitioners' Motion for Summary Judgment as to the access to the courts claim, but recommended that the court deny the motion as to the other claims. (App. 29). The magistrate judge further recommended the court deny Respondent's Motion for Summary Judgment. (App. 29).

Both parties filed Objections to the magistrate's Order and Findings and Recommendation. The district court granted Petitioners' Motion for Summary Judgment and denied Respondent's cross-motion. (App. 25-26). The court found Respondent was "not acting as an inmate law clerk" when he wrote to Tracy and accordingly enjoyed no special privilege in his correspondence to Tracy. (App. 23-24). The court then analyzed the prison's sanctions and regulations under *Turner v. Safley*, 482 U.S. 78 (1987), and concluded that the prison regulation that censored inmate-to-inmate correspondence was rationally connected to prison objectives of safety, security, and inmate rehabilitation. (App. 25). The court deemed the alternative Respondent proposed, that the prison read, but not censor, his correspondence to Tracy was "unacceptable and would have a dangerous impact on guards and other inmates." (App. 25). It held, finally, that the prison did not violate Respondent's First Amendment free speech rights because any "First Amendment right to assist other inmates is . . . inconsistent with his status as a prisoner and with the legitimate penological objectives of MSP." (App. 24-25).

The Ninth Circuit Court of Appeals reversed the district court. (App. 17). The Court of Appeals concluded that Respondent was acting as an inmate law clerk when he wrote to Tracy, that the First Amendment granted Respondent the right to assist Tracy, that legal advice is entitled to greater First Amendment protections than general correspondence, and that Petitioners' actions were an "exaggerated response" to MSP's legitimate security concerns. (App. 1).

REASONS THE COURT SHOULD GRANT THE PETITION

There are three reasons the Court should grant this petition. *First*, the circuit courts are divided when they assess whether a prison inmate possesses a First Amendment right to assist other inmates with litigation. *Second*, the Ninth Circuit opinion cannot be reconciled with the four decisions of this Court most relevant to the claimed First Amendment right. *Third*, the Court of Appeals' decision directly, and adversely, affects state management and security of prisons.

I. THE NINTH CIRCUIT COURT IDENTIFIED A FIRST AMENDMENT RIGHT FOR A PRISON INMATE TO ASSIST ANOTHER INMATE WITH LITIGATION REGARDLESS OF WHETHER THE LATTER INMATE HAS OTHER ASSISTANCE, BUT OTHER CIRCUIT COURTS REFUSE TO RECOGNIZE SUCH A RIGHT.

The Ninth Circuit found that "inmates have a First Amendment right to assist other inmates with their legal claims. . . . [T]he provision of legal assistance to fellow inmates is an activity protected by the First Amendment." (App. 6, 8 and 9). The court recognized, however, that the ruling conflicts with several other circuits' decisions: *Gibbs v. Hopkins*, 10 F.3d 373, 378 (6th Cir. 1993); *Gassler v. Rayl*, 862 F.2d 706, 708 (8th Cir. 1988); and *Smith v. Maschner*, 899 F.2d 940, 950 (10th Cir. 1990). (App. 9-10, fn.6). The Court of Appeals also could have added decisions from the Fifth and Eleventh Circuits. *Tighe v. Wall*, 100 F.3d 41, 43 (5th Cir. 1996); *Bass v. Singletary*, 143 F.3d 1442, 1446 (11th Cir. 1998). Indeed, the Ninth Circuit stands

alone with its conclusion that prison inmates enjoy a First Amendment right to render legal assistance to fellow inmates.[1] There is good reason for its isolation.

1. The Court of Appeals relied principally upon its prior decision in *Rizzo v. Dawson*, 778 F.2d 527 (9th Cir. 1985), to support the conclusion that inmates enjoy a First Amendment right to associate and, by apparent inference, to assist other inmates with legal matters. (App. 6, 8-9). There, a California prison inmate alleged prison staff retaliated against him and transferred him from San Quentin to another correctional facility because he assisted other inmates with their habeas corpus petitions and filed his own lawsuits. *Id.* at 529. The circuit court determined the inmate may be entitled to relief, and utilized the analysis of associational rights in a non-prison case, *Owens v. Rush*, 654 F.2d 1370 (10th Cir. 1981). In *Owens* the Tenth Circuit found that a government employer may not infringe upon a husband's First Amendment right of association when he assists his wife in a civil rights action. *Id.* at 1379. From that holding in a non-prison case, and the Supreme Court's holding in another non-prison case, *NAACP v. Button*, 371 U.S. 415

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[1] The Seventh Circuit has considered the issue but reached somewhat inconsistent conclusions. The decisions in *Brookins v. Kolb*, 990 F.2d 308 (7th Cir. 1993), and *Buise v. Hudkins*, 584 F.2d 223 (7th Cir. 1978), arguably suggest there is a First Amendment constitutional right to give legal assistance, but the court of appeals in *Gometz v. Henman*, 807 F.2d 113 (7th Cir. 1986), and *Kunzelman v. Thompson*, 799 F.2d 1172 (7th Cir. 1986), found there is no right to assist other inmates with legal matters. The Second Circuit discussed the issue but declined to express a view. *Nicholas v. Miller*, 189 F.3d 191, 195 (2d Cir. 1999).

(1963), the *Rizzo* court analogized and determined an *inmate*, possessed the same First Amendment associational rights to assist another inmate with litigation. 778 F.2d at 531-532.

For 14 years the Ninth Circuit cited *Rizzo* for the simple premise that inmates are entitled to due process of law and that prison officials may not retaliate against inmates for litigation activities. *See Hines v. Gomez*, 108 F.3d 265, 267 (9th Cir. 1997); *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995). Now, however, the panel below expanded the holding of *Rizzo* to protect all inmate-to-inmate correspondence of a legal nature under a theory that inmates possess a First Amendment associational right to assist each other with legal actions. (App. 6, 9).

2. The Ninth Circuit's ruling departs from the path charted by five other circuits. This departure arises from a disagreement over just what and whose constitutional right is at issue. Unlike the Ninth Circuit, the other courts of appeals have found the availability of inmate legal assistance grounded in the right of access to the courts which is "one of the privileges and immunities accorded citizens under article 4 of the Constitution and the Fourteenth Amendment. It is also one aspect of the First Amendment right to petition the government for redress of grievances." *Smith v. Maschner*, 899 F.2d 940, 947 (10th Cir. 1990) (citations omitted). Moreover, the inmate who receives the assistance is the inmate who possesses the right, not the inmate who gives the assistance. "The relevant constitutional protection . . . accrues to the benefit of the prisoner in whose name the lawsuit is filed, not those who assist in the preparation of that lawsuit." *Johnson v. Rodriguez*, 110 F.3d 299, 311 (5th Cir. 1997). *See also Gibbs*

v. Hopkins, 10 F.3d 373, 378 (6th Cir. 1993); *Abbott v. Meese*, 824 F.2d 1166, 1169 (D.C. Cir. 1987) *overruled on other grounds sub nom. Thornburgh v. Abbott*, 490 U.S. 401 (1989).

A sampling of the decisions from the other circuits underscores the nature, and seriousness, of their disagreement with the result here. In, *Gassler v. Rayl*, 862 F.2d 706, 707-708 (8th Cir. 1988) the court observed that "[t]here is . . . no right to be or to receive legal assistance from a jailhouse lawyer independent of the right of access to the court." The court noted in *Tighe v. Wall*, 100 F.3d 41, 43 (5th Cir. 1996) that "[p]risoners have no right to a particular prisoner's help in legal matters as long as the putative recipient's constitutional right of access to the courts is not infringed." The Sixth Circuit reasoned similarly in *Thaddeus-X v. Blatter*, 175 F.3d 378, 395 (6th Cir. 1999), when it stated that "[i]t is clear in this circuit that an inmate does not have an independent right to help other prisoners with their legal claims." A prisoner's right to assist another prisoner thus "is wholly derivative of that prisoner's right of access to the courts; prison officials may prohibit or limit jailhouse lawyering unless doing so interferes with an inmate's ability to present his grievances to a court." *Id.* at 395. Another circuit made the seemingly obvious point that, "[w]hile it is well established that inmates' access to the courts and counsel may not be abridged, an individual inmate does not have a constitutional right to 'practice' jailhouse law." *Williams v. Nix*, 1 F.3d 712, 716 (8th Cir. 1993) (citations omitted); *see also Johnson v. Rodriguez*, 110 F.3d at 311; *Herron v. Harrison*, 203 F.3d 410, 415-416 (6th Cir. 2000); *Flittie v. Solem*, 827 F.2d 276, 279-280 (8th Cir. 1987); *Smith v. Maschner*,

899 F.2d 940, 950 (10th Cir. 1990); *Bass v. Singletary*, 143 F.3d 1442, 1446 (11th Cir. 1998).

The only other circuit court that even arguably has approached this issue in a manner similar to the court below is the Seventh Circuit Court of Appeals. *See Buise v. Hudkins*, 584 F.2d 223, 229-231 (7th Cir. 1978); *Brookins v. Kolb*, 990 F.2d 308, 312-314 (7th Cir. 1993). The Seventh Circuit, though, refrained from actually determining whether inmates have an independent First Amendment associational right to give legal assistance. In *Buise*, the court withheld a definite ruling when it considered whether an inmate has a First Amendment associational right in "jailhouse lawyering." 584 F.2d at 230. It eventually concluded that an inmate "*may* have First Amendment associational rights in writ writing." *Id.* at 231 (emphasis added.).

The Seventh Circuit continued to analyze associational rights in *Brookins v. Kolb*, 990 F.2d 308 (7th Cir. 1993). *Brookins* dealt with an inmate whom the prison appointed to assist other inmates in what the prison called a Paralegal Base Committee ("PBC"). The prison sanctioned Brookins for failing to follow PBC rules when he wrote a letter to prison administrators about another inmate's misconduct charges. The court found Brookins possessed "associational rights to act on behalf of" the other prisoners "in his capacity as the co-chairman of the PBC. . . . " 990 F.2d at 312. The court acknowledged Brookins possessed only the "limited right" the State gave him and the other inmates "to form and take part in the PBC." *Id.* at 313. The letter he wrote for another inmate, the court said, "represents the extension of his right to associate with [the other inmate] within the scope

of the limited right the State had given the prisoners to form and operate the PBC." *Id.* The court did not directly address whether an inmate had an associational right to assist another inmate with litigation independent of any limited right the prison gave the inmate in the prison paralegal organization.

In two other decisions, *Kunzelman v. Thompson*, 799 F.2d 1172 (7th Cir. 1986), and *Gometz v. Henman*, 807 F.2d 113 (7th Cir. 1986), the court connected the inmate's legal assistance activities only with access to courts. The court in *Gometz*, with somewhat similar facts to the ones presented here, said a prisoner is entitled to adequate access to the courts, not "maximum possible access." *Id.* at 116. The inmate Gometz wanted to assist, like the inmate Respondent purportedly tried to assist here, had an attorney who represented him and the court noted, "legal representation is always sufficient" to satisfy adequate access to courts. *Id.* at 116. The court in *Kunzelman* said the First Amendment right claimed by Respondent and found by the Ninth Circuit may exist, but "the case law is unclear on the point." 799 F.2d at 1178 n.6. The Seventh Circuit, therefore, is at best equivocal on the question Petitioners present here.

If a Fifth, Sixth, Eighth, Tenth, or Eleventh Circuit panel had heard this case, they would have been required by prior circuit authority to reject Respondent's claimed First Amendment right to give legal advice, not only because here Tracy admittedly had no access-to-courts grievance because an attorney represented him, but also because these courts have not found inmates possess a First Amendment right to assist other inmates with legal issues. This Court should grant a writ of certiorari to

resolve the conflict over whether the First Amendment protects an inmate who wishes to assist other inmates with legal claims.

II. THE NINTH CIRCUIT DECISION CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS IN *JONES v. PRISONERS' UNION*, *TURNER v. SAFLEY*, *JOHNSON v. AVERY*, AND *LEWIS v. CASEY*.

A claim that concerns a prison inmate's right to provide legal assistance to another inmate involves a combination of three factors: inmates' rights to associate, to correspond, and to access the courts.[2] While this Court has not addressed these factors together nor in light of the question Petitioners present here, it has provided guidance on each of the three individual factors in a variety of cases. The definitive case involving inmate association is *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977), in which the Court held an inmate's right to associate is necessarily curtailed when the government incarcerates him in a correctional facility. The Court resolved the issue of inmate correspondence in *Turner v. Safley*, 482 U.S. 78 (1987). Lastly, it defined a prison's duties and obligations in conjunction with inmate access to courts first in *Johnson v. Avery*, 393 U.S. 483 (1969), and then in *Lewis v. Casey*, 518 U.S. 343 (1996). The Ninth Circuit has expanded significantly the Court's

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[2] The Ninth Circuit did not reach Respondent's access to courts claim (App. 15), and it did not discuss the First Amendment associational right in relation to an inmate's right to access the courts.

holdings in *Jones*, *Turner*, *Johnson*, and *Lewis* without identifying an appropriate doctrinal basis for doing so.

1. Communication between inmates necessarily involves some form of association. The ultimate manifestation of associational rights is, perhaps, best demonstrated through the formation of a union. In *Jones*, this Court reviewed the associational rights of inmates who sought to create a labor union within the North Carolina correctional system. 433 U.S. at 121. The North Carolina Department of Corrections, to curtail the union's recruitment activities, enacted a regulation "prohibit[ing] inmates from soliciting other inmates to join, . . . barred all meetings of the Union, and refused to deliver packets of Union publications that had been mailed in bulk to several inmates for redistribution among other prisoners." *Id.* This Court reversed the district court's injunction against the North Carolina Department of Corrections stating,

> Perhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls. The concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside of the penal institution. Equally as obvious, the inmate's "status as a prisoner" and the operational realities of a prison dictate restrictions on the associational rights among inmates. Because the realities of running a penal institution are complex and difficult, we have also recognized the wide-ranging deference to be accorded the decisions of prison administrators.

Id. at 125-126.

Although *Jones* clearly demonstrates that prison officials may curtail an inmate's First Amendment association rights, the Ninth Circuit concluded that inmates have a right to render legal assistance grounded in the First Amendment right to associate. (App. 9). The panel's decision expands inmates' associational rights rather than curtails them.

2. Likewise, if inmates possess a constitutional right to render legal assistance, such assistance may take the form of inmate correspondence as it did in this case. This Court provided guidance concerning inmate correspondence in *Turner*. There, the Court recognized that inmate-to-inmate correspondence poses a number of threats to the security of a prison. Inmates may write "in codes not readily subject to detection. . . . " 482 U.S. at 88. Inmate-to-inmate correspondence enhances the ability of inmates to engage in coordinated disruptive activities, spurs criminal activity, facilitates informal inmate organizations, and may "threaten the core functions of prison administration, maintaining safety and internal security." *Id.* at 88, 91-92; *see also Thornburgh v. Abbott*, 490 U.S. 401, 412 (1989). The Ninth Circuit disregarded or minimized these security concerns, as well as the burden on prison resources. This Court, however, has concluded that "[t]he risk of missing dangerous communications, taken together with the sheer burden on staff resources required to conduct item-by-item censorship, supports the judgment of prison officials that this alternative [monitoring inmate mail] is not an adequate alternative to restricting correspondence." 482 U.S. at 93. The Court

upheld a ban on inmate-to-inmate correspondence with very limited exceptions. *Id.* at 81, 93.[3]

The panel below, in contrast, concluded that legal advice was, "unlikely to cause the harms or injuries" that prison disciplinary rules were intended to prevent. (App. 13). Apparently, it believed that inmate-to-inmate correspondence is unlikely to cause the harms or injuries to prison safety and security this Court recognized in *Turner*. Despite the many inexorable problems this Court identified with inmate-to-inmate correspondence, the Ninth Circuit's decision makes it impossible for a prison to ban inmate-to-inmate correspondence because inmates must have some method by which to exercise their independent constitutional right to render legal assistance. Moreover, despite the fact Respondent sent his legal advice to a maximum security inmate, the Court of Appeals held that "the Prison's interest in security and order is at a low ebb when the correspondence in question is legal advice relating to a pending or potential case." (App. 12). Prison staff, in short, must forward the purported legal advice to the inmate despite the fact they may not detect and delete everything that constitutes a threat to institutional security, notwithstanding the fact that this Court has determined this is an unacceptable risk to prison safety and security. *Turner*, 482 U.S. at 93.

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[3] The Missouri regulations at issue only permitted correspondence between immediate family members and correspondence concerning legal matters, although, the way Missouri officials implemented the rules it only allowed correspondence between family members.

3. The Ninth Circuit's opinion further conflicts with this Court's prior decisions regarding inmate access to courts. In *Johnson*, this Court rejected a prison regulation that prohibited inmate "writ writers" from advising or helping other inmates with their habeas corpus claims because the prison furnished no other form of legal assistance to inmates. 393 U.S. at 490. The Court concluded that, "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation such as that here in issue, barring inmates from furnishing such assistance to other prisoners." *Id.* The Court noted that "techniques are available to provide alternatives if the State elects to prohibit mutual assistance among inmates." *Id.* The Court identified alternatives such as public defenders, law students, or pro bono bar associations. *Id.* at 489. In addition, this Court stated:

> Even in the absence of such alternatives, the State may impose reasonable restrictions and restraints upon the acknowledged propensity of prisoners to abuse both the giving and seeking of assistance in the preparation of applications for relief: for example, by limitations on the time and location of such activities and the imposition of punishment for the giving or receipt of consideration in connection with such activities.

Id. at 490.

Clearly, a State may prohibit writ writers from assisting other inmates so long as it provides other alternatives to inmates who need legal assistance. Here, the state district court appointed an attorney to represent Tracy, and MSP officials sent an inmate law clerk to assist him.

(App. 49). Even after MSP clearly met the *Johnson* mandate and Tracy had two forms of legal assistance, the Ninth Circuit opined that Respondent had a constitutional right to correspond with Tracy and assist him with his pending criminal charges. (App. 6).

Likewise, the Ninth Circuit cannot square its opinion with this Court's ruling in *Lewis*. There, this Court clarified 50 years of rulings on inmate access to courts. It concluded that its previous holdings did "not create an abstract, freestanding right to . . . legal assistance." 518 U.S. at 351. The corollary to that rule is also true: The Court's previous holdings did not create an abstract, freestanding constitutional right to render legal assistance. The Court of Appeals nevertheless held to the contrary. Moreover, under *Lewis*, inmates only possess the right to access the courts to attack "sentences, directly or collaterally, and in order to challenge the conditions of their confinement." *Id.* at 355. The opinion below gives Respondent the constitutional right to assist Tracy with a criminal prosecution when a member of the Montana bar already represented Tracy.

Clear precedent from this Court governs the fundamental aspects encompassed within Respondent's claims. The ruling in this case contradicts this Court's clear precedent in four seminal cases. The Court should review the Ninth Circuit's ruling and bring the Court of Appeals back into the bounds it previously demarcated concerning how the First Amendment applies in a prison setting.

III. THIS ISSUE IS OF EXCEPTIONAL IMPORTANCE

This Court has long established the "legitimacy, and the necessity, of considering the State's interests in prison safety and security." *Washington v. Harper*, 494 U.S. 210, 223 (1990), citing *Turner v. Safley*, 482 U.S. 78 (1987), and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). The issue of whether an inmate possesses an independent First Amendment associational right to render legal assistance to other prison inmates implicates prison discipline, inmate-to-inmate prison correspondence, and the scope of the prison's legal assistance program. This issue, therefore, affects prison security and management.

This Court recognizes the myriad forms of threats inmate-to-inmate correspondence poses to prison security. *Turner v. Safley*, 482 U.S. at 88, 91. Inmates may utilize coded language within written correspondence to coordinate and communicate a wide variety of concerted criminal activity within the facility including "escape plans, assaults, and other violent acts." *Id.* Additionally, inmate law clerk programs may pose additional risks to prison security because they help create a class of inmates who may charge for their services and thereby establish a barter economy within the prison. *See Williams v. Nix*, 1 F.3d 712, 715 (8th Cir. 1993). Also, inmate law clerks may begin to have an "overinflated sense of importance" which leads to disciplinary problems. *Brookins*, 990 F.2d at 315. The issue Petitioners present, therefore, becomes important because prisons within the geographically expansive Ninth Circuit must allow inmates to exercise their First Amendment right to assist other inmates, and prisons must devise methods to eliminate the obvious threats to prison security.

When prison officials must make a determination about a prisoner's right to free speech the officials must balance the right with institutional security and safety concerns. *Turner*, 482 U.S. at 92. The choice prison officials make when they must engage in this balancing act "should not be lightly set aside by the courts." *Turner*, 482 U.S. at 93. This Court consequently has cautioned the lower courts that "federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." *Sandin v. Conner*, 515 U.S. 472, 482 (1995). Even the Ninth Circuit has adopted the view that courts must allow prison officials to manage the prisons without excessive judicial involvement. *See Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995).

The Ninth Circuit's holding that inmates possess a First Amendment associational right to give legal advice to other inmates, regardless of whether the prison provides other types of legal assistance, abrogates prison officials' ability to take appropriate action to ensure the safety of inmates, corrections personnel, and the public. If prison inmates have a constitutional right to give legal assistance to other inmates, prison officials may not infringe that right in the absence of reasonable alternatives for prison inmates to exercise the right. *Turner*, 482 U.S. at 92-93. Accordingly, the prison must provide some method by which inmates may exercise this constitutional right and this will detract from prison officials' ability to make safety and security decisions. The Ninth Circuit's decision also invades the province of state officials, creates attendant security problems, and elevates this to an issue of exceptional importance. Given the disparate analytical approaches courts have taken when they address

this issue, and the extreme importance of the issue to states and their prisons, Petitioners assert that it is appropriate for this Court to grant review and provide much needed clarification and guidance on the scope of prisoners' First Amendment rights and the scope of prisons' inmate legal assistance programs.

CONCLUSION

For the foregoing reasons the Court should grant a writ of certiorari.

Respectfully submitted,

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March, 2000

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEVIN MURPHY, *Plaintiff-Appellant,* v. ROBERT SHAW, Unit Sergeant; LARRY BEARLEY, Hearings Officer; MICHAEL MAHONEY, Bureau Warden; MYRON BEESON, Bureau Warden; and RICHARD S. DAY, Director, Department of Corrections, *Defendants-Appellees.*	No. 97-35989 D.C. No. CV 95-00062-CCL OPINION

Appeal from the United States District Court for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued and Submitted
March 12, 1999 – Seattle, Washington

Filed November 4, 1999

Before: Betty B. Fletcher, Stephen Reinhardt, and Sidney R. Thomas, Circuit Judges.

Opinion by Judge B. Fletcher

COUNSEL

Jeffrey T. Renz, Montana Defender Project, University of Montana School of Law, Missoula, Montana, for the plaintiff-appellant.

David L. Ohler, Assistant Attorney General, Montana Department of Corrections, Helena, Montana, for the defendants-appellees.

OPINION

B. FLETCHER, Circuit Judge:

Plaintiff-Appellant Kevin Murphy ("Murphy") is an inmate law clerk at the Montana State Prison ("Prison"). In early 1995, he sent a letter containing legal advice to fellow inmate Pat Tracy ("Tracy"). Murphy was subsequently disciplined based on the content of that letter. In this action, Murphy alleges that the discipline imposed by the Prison violated his First Amendment rights, his right as an inmate to access to the courts, and his rights under the Due Process Clause. The district court granted summary judgment in favor of the defendants on all his claims. Because the provision of legal assistance to fellow inmates is an activity protected by the First Amendment, and because the prison regulations challenged here are "an exaggerated response" to otherwise legitimate security concerns, we reverse and remand with instructions that summary judgment be entered in Murphy's favor.

Facts and Procedural History

In early 1995, Murphy, who had been trained as an inmate legal clerk by the Prison, became aware that Tracy,

a fellow inmate, had been charged with assaulting Correctional Officer Glen Galle ("CO Galle"). Murphy had provided legal assistance to Tracy on several prior occasions, and learned that Tracy had requested his assistance in connection with the assault charge. Because Tracy had been transferred to the maximum security wing of the Prison, however, Murphy could not visit him directly. Murphy also knew that counsel had been appointed to represent Tracy. Nevertheless, Murphy began investigating the assault incident, and discovered that other inmates had previously complained about CO Galle's conduct.

On February 16, 1995, Murphy wrote a letter to Tracy which included the following:

> . . . I do want to help you with your case against Galle. It wasn't your fault and I know he provoked whatever happened! Don't plead guilty because we can get at least 100 witnesses to testify that Galle is an over zealous guard who has a personal agenda to punish and harass inmates. He has made homo-sexual advances towards certain inmates and that can be brought up into the record. There are petitions against him and I have tried to get the Unit Manager to do something about what he does in Close II, but all that happened is that I received two writeups from him myself as retaliation. So we must pursue this out of the prison system. I am filing a suit with everyone in Close I and II named against him. So you can use that too!
>
> Another poiont [sic] is that he grabbed you from behind. You tell your lawyer to get ahold of me on this. Don't take a plea bargain unless it's for no more time. . . .

Murphy knew that the letter would be read by prison officials pursuant to prison regulations. The letter was, in fact, intercepted and read by defendant Robert Shaw.[1]

As a result of the February 16 letter, Murphy was "written up." Defendant Shaw completed three Major Misconduct Violation Reports (also known as "Class IIs") charging Murphy with violating the following Prison regulations: Rule 009 (Insolence), Rule 022 (Interference with Due Process Hearings), and Rule 025 (Conduct which Disrupts or Interferes with the Security or Orderly Operation of the Institution). After a hearing, defendant Larry Bearley found Murphy guilty of violating Rules 009[2] and 022.[3] Murphy was given a suspended sentence of 10 days detention and received three "reclassification points."

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[1] Tracy, having never seen the letter, ultimately pleaded guilty to the assault charge. It does not appear that Tracy or his counsel ever were made aware prior to the plea of the information in Murphy's letter.

[2] Rule 009 prohibits the following:

Insolence: Words, actions or other behavior which is intended to harass or cause alarm in an employee.

[Examples:] Cursing; abusive language, writing or gestures directed to an employee.

[3] Rule 022 prohibits the following:

Interference with Due Process Hearings [Examples:] Intimidating or tampering with an informant or witness; tampering with or destroying evidence; interfering with an employee in the process of writing a conduct report; making a false statement of misconduct against another inmate or staff that could result in disciplinary action. (This violation should not be charged for as a retaliation for the writing of a grievance.)

Murphy's appeal was denied by defendant Michael Mahoney.

In October 1995, Murphy filed a complaint against Robert Shaw, Larry Bearley, Michael Mahoney, Myron Beeson, and Richard Day, all employees of the Montana Department of Corrections (collectively, "Defendants"). The complaint, filed as a class action on behalf of all inmate law clerks at the Prison, seeks injunctive and declaratory relief pursuant to 42 U.S.C. § 1983. The complaint alleges that the Prison's imposition of discipline on Murphy (1) violated the First Amendment; (2) abridged the right of inmates to access to the courts and to present habeas petitions; and (3) relied on prison regulations that are void for vagueness on their face and as applied to legal advice rendered by law clerks.

The case was referred for recommendation to a magistrate judge, and Murphy and Defendants subsequently filed cross-motions for summary judgment. Murphy also filed a motion to certify the class. The magistrate judge recommended that Defendants' motion for summary judgment be granted as to Murphy's "right of access to the courts" claims, and that all other motions be denied. Murphy and Defendants each timely filed objections to the magistrate's recommendation. On *de novo* review, the district court concluded that Defendants' motion for summary judgment should be granted in its entirety, and that Murphy's motion for class certification should be

denied.[4] Final judgment was entered by the district court on September 23, 1997. This appeal followed.

ANALYSIS

The district court granted summary judgment in favor of Defendants. A grant of summary judgment is reviewed *de novo*. *See Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). We have jurisdiction pursuant to 28 U.S.C. § 1291 and must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there exist any genuine issues of material fact and whether the district court correctly applied the substantive law. *See id.*

I. Murphy's First Amendment claim

The viability of Murphy's First Amendment claim turns on the application of two established legal principles. First, this court has held that inmates have a First Amendment right to assist other inmates with their legal claims. *See Rizzo v. Dawson*, 778 F.2d 527, 531 (9th Cir. 1985). Second, where a prison regulation, otherwise generally justifiable, implicates a constitutional interest when applied to a protected class of expression, this court applies a balancing test to insure that the regulation is not an "exaggerated response." *See Bradley v. Hall*, 64 F.3d 1276, 1280 (9th Cir. 1995) (quoting *Turner v. Safley*, 482 U.S. 78, 89-90 (1987)). From these two principles flows the

[4] Murphy has not appealed the denial of his motion for class certification.

conclusion that the district court erred in entering summary judgment in favor of Defendants here.

A. Was Murphy acting as a law clerk?

Defendants focus their attention on what they perceive as a threshold issue. In their view, Murphy was not acting as a law clerk when he wrote and sent the February 16 letter to Tracy. Defendants accordingly argue that this case involves merely an unremarkable instance of discipline for inmate-to-inmate correspondence, comfortably within the general rule that prisons may, in the pursuit of the interest of prison security, intercept and confiscate inmate-to-inmate correspondence without running afoul of the First Amendment. *See Turner v. Safley*, 482 U.S. at 89 (inmate-to-inmate correspondence may be banned so long as the policy is rationally related to a legitimate penological interest).

To support their view, Defendants point out that Murphy was not formally assigned by the Prison's law librarian to serve as Tracy's law clerk. Moreover, Murphy was aware that he could not visit Tracy in the maximum security wing, and that counsel had been appointed for Tracy in connection with the assault charge. The district court also noted that Murphy had not been trained to handle criminal cases. Murphy, in response, notes that Tracy specifically asked for his legal assistance. It is undisputed that Murphy had served as Tracy's law clerk on several occasions in the past. Murphy also contends that law clerk assignment procedures were considerably more informal than indicated by the regulations, and that Murphy responded to Tracy's request for assistance in the

usual manner.[5] The contents of the February 16 letter, moreover, plainly relate to Tracy's assault charge, suggesting to Tracy a self-defense theory that he might raise.

On the basis of the undisputed facts, we reject Defendants' threshold argument that Murphy was not acting as a law clerk when he wrote the February 16 letter. Murphy was a trained inmate law clerk responding to a legal inquiry from a fellow inmate, an inmate he had advised on several prior occasions. The letter he sent to Tracy was plainly related to the pending assault charges, and conveyed both factual and legal information that was potentially relevant to Tracy's defense. As will be discussed below, this circuit in *Rizzo v. Dawson*, 778 F.2d 527, 531 (9th Cir. 1985), recognized that the provision of legal assistance to a fellow inmate is an activity protected by the First Amendment. The undisputed facts here are enough to raise the First Amendment right recognized in *Rizzo*. *Cf. Rizzo*, 778 F.2d at 531 (plaintiff offered legal advice informally, outside any "inmate law clerk" program sponsored by the prison).

B. Does the Prison's conduct implicate Murphy's First Amendment rights?

The Prison's imposition of discipline on Murphy implicates his First Amendment rights for at least two reasons. First, the letter itself constitutes speech that, outside of the prison context, would doubtless enjoy the

[5] Defendants have introduced no evidence rebutting Murphy's account of the actual operation of the law clerk assignment process.

protection of the First Amendment. The fact that the speech occurs inside the prison walls means that prison authorities may, in appropriate circumstances, regulate the speech, but does not take it outside the reach of the First Amendment altogether. The Supreme Court, for example, has held that censorship of inmate-to-inmate correspondence must be reasonably related to legitimate penological interests in order to pass constitutional muster. *See Turner*, 482 U.S. at 91 (applying "reasonably related to legitimate penological interests" test to challenged regulation of inmate-to-inmate correspondence).

Second, as noted above, the Prison's discipline of Murphy implicates the First Amendment right recognized by this court in *Rizzo*. In that case, we held that the provision of legal assistance to fellow inmates is an activity protected by the First Amendment. *See Rizzo*, 778 F.2d at 531; *see also Pratt v. Rowland*, 65 F.3d 802, 806-07 (9th Cir. 1995) (reaffirming vitality of *Rizzo* after the Supreme Court's decision in *Sandin v. Conner*, 115 S.Ct. 2293 (1995)). *Rizzo* involved a claim by a "jailhouse lawyer" that prison authorities had reassigned him out of a prison vocational program in retaliation for his assisting other inmates with habeas petitions and civil rights actions. *See id.* We held that his legal activities on behalf of other inmates implicated associational rights protected by the First Amendment. *See id.* To the extent such a right exists,[6] the Prison's decision to discipline Murphy in the instant case undoubtedly interferes with that right.

[6] We note that several of our sister circuits have refused to recognize a constitutional right to assist others in pressing legal claims. *See, e.g., Gibbs v. Hopkins*, 10 F.3d 373, 378 (6th Cir. 1993) ("[N]o constitutional right to assist exists."); *Smith v. Maschner*,

C. Is the infringement of First Amendment rights justified under the *Turner v. Safley* test?

We next ask whether the Prison's infringement of Murphy's First Amendment rights is justified in light of "legitimate penological interests." *See Turner*, 482 U.S. at 89. Although "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," *see id.* at 84, the courts must accord deference to prison authorities on matters within their expertise, *see id.* at 85. The Supreme Court has designed a special standard of review for the prison context: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89; *accord Thornburgh v. Abbott*, 490 U.S. 401, 409 (1989). While this standard is quite deferential, the Supreme Court has cautioned that "a reasonableness standard is not toothless." *Abbott*, 490 U.S. at 414.

In evaluating the "reasonableness" of a prison's invasion into the constitutional rights of prisoners, the Supreme Court has instructed lower courts to evaluate four factors: (1) whether the governmental objective is legitimate and neutral, and whether the prison regulation is rationally related to that objective; (2) whether there are alternate means of exercising the rights that remain open to prison inmates; (3) what impact accommodation

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899 F.2d 940, 950 (10th Cir. 1990) (an inmate "does not have a protected interest in providing legal representation to other inmates"); *Gassler v. Rayl*, 862 F.2d 706, 708 (8th Cir. 1988) ("[A]n inmate simply does not have the right to provide his fellow inmates with legal assistance.").

of inmates' rights would have on guards, other inmates, and prison resources; and (4) the availability of obvious, easy alternatives to the challenged prison regulation. *See Abbott*, 490 U.S. at 414-18; *accord Mauro v. Arpaio*, ___ F.3d ___, ___ (9th Cir. 1999) (en banc).

1. Rational relation to a legitimate, neutral governmental interest.

The interest advanced by Defendants here is the general interest in security and order. It is undisputed that this interest is legitimate. *See, e.g., Abbott*, 490 U.S. at 415 (prison security is a purpose central to all other corrections goals). It also appears to be "neutral" in the relevant sense – "the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression." *Id.* Finally, it is also plain that, as a general matter, the Prison Rules at issue – Rule 009 (Insolence) and 022 (Interference with Due Process Hearings) – are rationally related to the Prison's stated interest.

Murphy, however, is not challenging the regulations as applied to inmate correspondence generally. Rather, Murphy attacks the regulations as applied to legal correspondence between an inmate performing the functions of a law clerk and the inmate he is advising. When a prison regulation, while rationally-related to a legitimate interest in the general case, threatens constitutional interests as applied to a particular category of protected expression, we must inquire whether the prison rule is "an exaggerated response." *Bradley v. Hall*, 64 F.3d 1276, 1280 (9th Cir. 1995). In answering this question, the court

"must balance the importance of the prisoner's infringed right against the importance of the penological interest served by the rule." *Id.* The court must also "examine the strength of the logical nexus between the penological purpose served and restriction of the prisoner's rights." *Id.*[7]

Here, the enforcement of the prison regulations against Murphy infringes on his First Amendment right to provide legal assistance to fellow inmates. *See Rizzo*, 778 F.2d at 531. At the same time, the Prison's interest in security and order is at a low ebb when the correspondence in question is legal advice relating to a pending or potential case. The Prison, for example, has little reason to enforce Rule 009 (Insolence) in this context, since it can easily shield corrections officers from any "alarming" statements contained in inmate mail. *See Bradley*, 64 F.3d at 1281 (prison can easily shield COs who have direct

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[7] The court in *Bradley* provided the following illustration:

> A prison rule requiring all inmates to shower on Tuesdays would serve the legitimate penological interest of maintaining hygienic conditions. However, it is unlikely that this Court would permit prison officials to keep a prisoner from attending a court date that happened to fall on a Tuesday. The importance of the prisoner's right to attend his own court date would outweigh the legitimate, though less pressing, prison interest in a clean, fragrant prison atmosphere. Such a rule would be an exaggerated response. Thus, our analysis does not necessarily end at the recognition that the prison rule was adopted to serve, and actually does serve, a legitimate penological interest.

Bradley, 64 F.3d at 1280.

contact with inmates from contents of inmate mail). Similarly, the contents of correspondence regarding cases is unlikely in itself to cause the harms or injuries that Rule 022 is intended to prevent.

Thus, it appears that the "logical nexus" here between the governmental interest and the application of the rules to law clerk correspondence is weak. The *Bradley* balance appears to favor Murphy, suggesting that the prison regulations, as applied to him, are an "exaggerated response."

2. Alternate means of exercising the infringed right.

It does not appear that Murphy has any alternative means to exercise his right to render legal assistance to maximum security inmates who, like Tracy, he is not permitted to visit. Although Defendants suggest that Murphy could have forwarded his letter directly to Tracy's appointed counsel, there is nothing in the record indicating that Murphy had access to that lawyer's name or address.

3. Impact on prison employees, other inmates, and prison resources.

Murphy asks that law clerks not be subject to discipline based on the content of the legal advice they provide. He does not suggest that law clerk correspondence be immune from interception and review. Accordingly, prison officials could continue to monitor correspondence and discipline law clerks for any improper material that

does not relate to legal action. Because Prison officials already review internal inmate mail, evaluating content on a variety of criteria, Murphy's proposed solution would entail no additional burden on prison resources. Similarly, so long as corrections officers who directly interact with inmates are shielded from the mail, there is no risk of their being exposed to "alarming" statements about themselves. *See Bradley*, 64 F.3d at 1281 (prison's security concerns could be easily addressed by "shield[ing] those prison officials who are in direct contact with inmates from reading any insulting remarks that might be contained in . . . grievances."). We conclude that the impact on prison employees and resources would be minimal.

4. Availability of easy, obvious alternatives.

As noted in the preceding section, the purposes of Rule 009 (Insolence) can easily be accommodated by shielding corrections officers who have direct contact with inmates from inmate mail. The fact that the prison officials will read the legal correspondence should be adequate protection against the implementation of any plan to interfere with Due Process Hearings (Rule 022).

D. Conclusion.

In light of the weak nexus between the government's stated penological interest and the category of law clerk correspondence, as well as the availability of ready alternatives, we conclude that the Prison's conduct here constitutes an "exaggerated response." *See Bradley*, 64 F.3d at

1280. Accordingly, we reverse the district court's grant of summary judgment in favor of Defendants with respect to Murphy's First Amendment claim.

In addition, we conclude that summary judgment should be entered in Murphy's favor on his First Amendment claim. The relevant facts are undisputed: Murphy is a law clerk; his letter to Tracy contained legal advice; as applied to legitimate law clerk correspondence, Rules 009 and 022 are an "exaggerated response" to the Prison's interest in security and order, and thus impermissibly infringe Murphy's First Amendment rights. Defendants have failed to identify any issue of material fact that would defeat this legal conclusion.

II. Right of Access to the Courts and Due Process Claims

As noted at the outset, Murphy also argues that the Prison's interference with law clerk mail infringes inmates' right of access to the courts. *See Lewis v. Casey*, 116 S. Ct. 2174 (1996); *Bounds v. Smith*, 430 U.S. 817 (1977). Because we believe he is entitled to summary judgment on his First Amendment claim, we do not reach Murphy's "right of access to the courts" arguments.

We must, however, address at least a portion of Murphy's due process claim. Murphy contends that Rule 009 and Rule 022, both as applied to him and on their face, are so vague as to violate principles of due process. In light of our resolution of Murphy's First Amendment claim, we do not reach his "as applied" challenge to the Prison rules at issue.

As for Murphy's facial challenge to Rule 009 and 022, we begin with the proposition that "[i]t is clearly established, both by common sense and precedent, that due process requires fair notice of what conduct is prohibited before a sanction can be imposed." *Newell v. Sauser*, 79 F.3d 115, 117 (9th Cir. 1996). Consequently, in order to comply with the dictates of the Due Process Clause, a prison regulation must provide fair notice of what is prohibited before a sanction can be imposed. *See id.*; *accord Rios v. Lane*, 812 F.2d 1032, 1039 (7th Cir. 1987); *Adams v. Gunnell*, 729 F.2d 362, 368-69 (5th Cir. 1984).

Murphy maintains that Rules 009 and 022 do not adequately define the conduct that comes within their scope. This argument fails to persuade – the regulations certainly provide adequate notice to prisoners generally. Rule 009, for example, applies to "words . . . intended to harass or cause alarm in an employee." This definition is supplemented by the following examples: "Cursing; abusive language, writing or gestures directed to an employee." Rule 022, while it lacks a general definition, provides a laundry list of clear examples: "Intimidating or tampering with an informant or witness; tampering with or destroying evidence; interfering with an employee in the process of writing a conduct report; making a false statement of misconduct against another inmate or staff that could result in disciplinary action." While clearer language could be imagined, the challenged regulations are the sort that every prison enforces in order to maintain order. Murphy has not produced any authority to support his facial challenge, and we reject it.

CONCLUSION

The district court's decision is REVERSED and the matter REMANDED with instructions to enter summary judgment in Murphy's favor and for the crafting of an appropriate remedy.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

KEVIN MURPHY,

Plaintiff,

-v-

ROBERT SHAW, Unit Sergeant, LARRY BEARLEY, Hearings Officer, MICHAEL MAHONEY and MYRON BEESON, Bureau Wardens, and RICK DAY, Department of Corrections Director,

Defendants.

CV 95-62-H-CCL

ORDER

(Filed Sep. 10, 1997)

Before the court is the United States Magistrate Judge's Findings and Recommendation regarding Plaintiff's civil rights complaint. The Magistrate Judge recommends that Plaintiff's motion for summary judgment be denied and Defendants' motion for summary judgment be granted as to Plaintiff's claim of denial of access to the courts but denied as to all other claims. Both Plaintiff and Defendants have objected to the Magistrate's findings and recommendations. This court subjects such objections to a *de novo* review. 28 U.S.C. § 636(b)(1).

Plaintiff Kevin Murphy, now paroled from Montana State Prison ("MSP") but apparently facing new felony charges in two counties, was at the time of the filing of

this complaint an inmate law clerk at MSP residing in the high security area. Plaintiff filed his complaint pursuant to § 1983, individually and on behalf of all inmate law clerks, to allege that his First Amendment rights of free speech and right of access to the courts had been violated by MSP authorities.

Plaintiff's complaint arises from MSP's censorship of Plaintiff's inmate-to-inmate correspondence with inmate Pat Tracy, a Maximum Security Unit inmate. Plaintiff wrote to Tracy on February 16, 1995, to offer advice and assistance regarding a pending criminal matter. Tracy had been charged in state district court in Powell County, Montana, with felony assault of an MSP guard. Tracy was already represented by defense counsel, a licensed practitioner, at the time Plaintiff wrote his letter. Because of Plaintiff's housing assignment in the high security area, Plaintiff was not authorized by MSP's written inmate law clerk policy to represent an inmate in the Maximum Security Unit. Nevertheless, Plaintiff sent the following correspondence to Tracy:

> Dear Pat:
>
> How ya doing? Sorry I haven't wrote before now. I been busy fighting my charges. Finally got everything taken care of. I can't come up to max anymore. the lowside [sic] clerks go up there now. that's why I haven't called you out like I used to. I do want to help you with your case against Galle. It wasn't your fault and I know he provoked whatever happened! Don't plead guilty because we can get at least 100 witnesses to testify that Galle is an over zealous guard who has a personal agenda to punish and harrass [sic] inmates. He has made homo-sexual

advances toward certain inmates and that can be brought up into the record. There are petitions against him and I have tried to get the Unit Manager to do something about what he does in Close II, but all that happened is that I received two writeups from him myself as retaliation. So we must pursue this out of the prison system. I am filing a suit with everyone in Close I and II named against him. So you can use that too!

Another point is that he grabbed you from behind. You tell your lawyer to get ahold [sic] of me on this. Don't take a plea bargain unless it's for no more time.

I seen Damie for a little while when I was out. I never came over to Butte much. Lenny is living in lower D still and I don't speak to him much. His sister did something to Ted from what I heard. I don't know what. Well I will write again when I get this thing against Galle finished.

Later. . . .

Murph

Pl.'s Mot. For Summ. Judg., Ex. 1.

Following the MSP policy of reading all inmate correspondence entering the Maximum Security Unit, this letter was read by MSP Correctional Officer Robert Shaw, who cited Plaintiff for three major misconduct violations: insolence (Rule 009), interference with due process hearings (Rule 022), and conduct which disrupts or interferes with the security or orderly operation of the institution (Rule 025). Hearings Officer Larry Bearley found Plaintiff guilty of violating Rules 009 and 022, and imposed a sanction of ten days detention, suspended. Bearley

explained that the statement accusing the guard of making homosexual advances to an inmate constitutes an accusation that, if proved true, would result in disciplinary action against the guard. This statement was deemed to fall within Rule 022, interference with due process hearings, i.e., making a false statement of misconduct against another inmate or staff which could result in a disciplinary action. *See* Pl.'s Request for Judicial Notice, Ex. 1, "Inmate Disciplinary Policy," at 6. It is unclear whether Plaintiff's offer to find 100 witnesses was contemplated within this charge. Plaintiff appealed to Defendant Michael Mahoney, who affirmed the Hearings Officer's decision. The statement against the guard was also deemed to constitute insolence (Rule 009), defined by the Inmate Disciplinary Policy as "words, actions or other behavior which is intended to harass or cause alarm in an employee." *Id.* at 4. In affirming the finding of violation and sanction, Mr. Mahoney stated "[t]he letter you wrote to [sic] most definitely causes alarm in this employee." *See* Pl.'s Mot. for Summ. Judg., Ex. 3.

Plaintiff does not argue that Defendants had no right to read his inmate-to-inmate correspondence. *See* Plaintiff's Reply (Docket #50) at 1. Plaintiff does argue that his correspondence was illegally censored and that he was illegally disciplined because of the content of his correspondence, both in violation of his First Amendment rights of free speech and access to courts.

Defendants counter that Plaintiff had no right to give legal advice to another inmate and that, in any event, prison regulations allowing censorship and discipline under these factual circumstances are rationally related to legitimate penological interests.

The Magistrate Judge analyzed Plaintiff's complaint as consisting of a claim for denial of access to the courts asserted on behalf of inmate Tracy and a First Amendment right of free speech. The Magistrate determined that Plaintiff lacked standing to assert a denial of access to the courts claim on behalf of Tracy. Plaintiff objects to this finding of no standing, citing *Johnson v. Avery*, 393 U.S. 483 (1969), in which an inmate was disciplined for assisting other inmates with their legal affairs. This court agrees with Plaintiff that an inmate law clerk does have standing to assert a denial of access to the courts when he can show actual injury, such as disciplinary action. However, *Johnson v. Avery* qualifies the right of an inmate to provide legal assistance with the proviso that the right does not exist if the state provides reasonable alternatives.

As for Plaintiff's First Amendment free speech, the Magistrate grounds the analysis in the *Turner v. Safly*, 482 U.S. 78 (1987), rule that prison administrators may restrict speech if the restrictions are "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. The Magistrate found that there was insufficient evidence of the relationship between the regulations and the alleged penological interests of MSP. In response, Defendants have submitted the affidavit of Mr. Mahoney, now Warden of MSP, who asserts that MSP Prison Policy 16-001 concerning inmate correspondence is directly related to maintaining order at the institution, security, and inmate rehabilitation. Mr. Mahoney states that no inmate, even an inmate law clerk, can be exempt from the institution's correspondence policies, because "every inmate poses a potential risk to the security and safety of

the institution through correspondence." Def.'s Resp. To Magistrate's Order, Findings, and Recommendation, Aff. of Mike Mahoney at 3.

As for Plaintiff's due process claim that the prison correspondence regulations deprived him of his rights arising under the Due Process Clause of the U.S. Constitution, the Magistrate determined that Defendants had not properly argued the point and summary judgment should be denied on that account. Thus, this court is left with the question whether the Due Process Clause "of its own force" provides protections to Plaintiff that would protect him from the sanctions imposed for his alleged violations. *See Sandin v. Conner*, 115 S. Ct. 2293, 2302 (1993). In *Sandin*, the Court opined that the Due Process Clause might protect inmates of its own force when restraints exceeding their sentences are placed upon them in such an unexpected manner as to trigger this fundamental protection. Defendants respond that this case is not about the use of improper procedures, but about the right of the prison to censor inmate-to-inmate correspondence based upon rationally related and legitimate penological interests.

In reviewing the Magistrate's findings and the objections of the parties, the court has concluded that there has been made a significant mistake of fact. Plaintiff was not acting as an inmate law clerk when he wrote and sent the February 16, 1995, letter to inmate Pat Tracy. First, Plaintiff was not assigned to serve as inmate Tracy's law clerk by the prison librarian, as is required by written policy. *See* Ex. 3 at VI(1), (3), "Inmate Legal Clerk Program," Pl.'s Request for Judicial Notice. Second, Plaintiff was not permitted to work for inmate Tracy because both inmates

resided in the high security side of the prison. Third, Plaintiff was not trained as an inmate law clerk to handle criminal defense cases. Fourth, as Plaintiff clearly knew, inmate Tracy was already represented by defense counsel.

This latter point is significant, because it shows that the State had otherwise provided inmate Tracy with reasonable representation, clearly precluding any denial of access to the courts claim. In fact, Plaintiff's letter could easily be construed as an improper and unethical interference with the attorney-client relationship. In any event, this court finds that Plaintiff was not acting in his role of inmate law clerk when he wrote and sent the February 16, 1995, letter to inmate Pat Tracy, but had clearly exceeded the scope of his appointment by intruding upon a subject matter he was not trained to handle and by imposing himself upon a client he had no permission or authority to contact.

Given this finding, Plaintiff's claims must be analyzed without consideration of any privilege that law clerk status might provide. It is clear that Plaintiff's claim for denial of access to the courts fails. Likewise, Plaintiff's claim for violation of his First Amendment freedom of speech similarly fails in light of the legitimate penological interests asserted by Warden Mahoney. Plaintiff's due process claims under the force of the Due Process Clause do not satisfy the *Sandin* standard that the restraint exceed the inmate's sentence in an unexpected manner.

Plaintiff's First Amendment right to assist other inmates is, in this instance, inconsistent with his status as

a prisoner and with the legitimate penological objectives of MSP. *See Pell v. Procunier,* 417 U.S. 817, 822 (1974). Plaintiff's claim of overbreadth and vagueness of the regulations is based upon a First Amendment right and a Due Process right, both of which are limited by the legitimate penological objectives of the prison. *Ustrak v. Fairman,* 781 F.2d 573, 580 (7th Cir. 1986); *Sandin v. Conner,* 115 S. Ct. 2293 (1995). After applying the four-part test of *Turner v. Safley,* the court finds that there is a valid, rational connection between the prison inmate correspondence policy and the objectives of prison order, security, and inmate rehabilitation. The court finds that the alternative proposed by Plaintiff, that communications between Plaintiff and inmate Tracy may be read but otherwise considered privileged, is unacceptable and would have a dangerous impact on guards and other inmates. The prison's concern is reasonable, and ready alternatives are lacking.

In another matter, the court deems the Magistrate's order denying class certification to be a recommendation. The Plaintiff's request for class certification should be denied, however, because, on the facts of this case and for purposes of this litigation, Plaintiff himself does not belong to the class of inmate law clerks. Therefore, Plaintiff cannot satisfy the requirements for certification of a class action under Fed. R. Civ. P. 23.

Accordingly,

IT IS HEREBY ORDERED that Defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's motion for class certification is DENIED.

IT IS FURTHER ORDERED that Plaintiff's motion for summary judgment is DENIED, Plaintiff's complaint is DISMISSED, and all relief is denied.

The Clerk is directed forthwith to notify the parties and Magistrate Judge Leif B. Erickson of entry of this order.

Done and dated this 10th day of September, 1997.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

United States District Court

HELENA DIVISION DISTRICT OF MONTANA

KEVIN MURPHY

v.

ROBERT SHAW, Unit Sergeant, LARRY EARLEY, Hearings Officer, MICHAEL MAHONEY and MYRON BEESON, Bureau Wardens, and RIck Day, Department of Corrections Director

JUDGMENT IN A CIVIL CASE

CASE NUMBER: CV-95-62-H-CCL

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered. Defendants' motion for summary judgment having been granted and Plaintiff's motion for summary judgment having been denied IT IS ORDERED AND ADJUDGED that Plaintiff take nothing, that the complaint be dismissed, and all relief is denied.

September 23, 1997
Date

Lou Aleksich, Jr.
Clerk

Traci Hargreaves
(By) Deputy Clerk

Honorable Leif B. Erickson
Federal Magistrate Judge
Missoula Division
P O Box 7219
Missoula, MT 59807-7219

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION**

KEVIN MURPHY, Plaintiff, vs. ROBERT SHAW, Unit Sergeant, LARRY BEARLEY, Hearing Officer, MICHAEL MAHONEY and MYRON BEESON, Bureau Wardens, and RICK DAY, Department of Corrections Director, Defendant.	CAUSE NO. CV 95-62-H-CCL ORDER AND FINDINGS AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE (Filed Febr. 26, 1997)

This matter comes before the Court on the parties' cross-motions for summary judgment and Plaintiff's Motion to Certify Class. The Court, having reviewed the briefs and being fully advised, now hereby enters the following Findings and Recommendation under 28 U.S.C. § 636(b)(1)(B):

RECOMMENDATION

1. Plaintiff's cross-motion for summary judgment should be **DENIED.**

2. Defendants' cross-motion for summary judgment should be **GRANTED** as to Plaintiff's claim of denial of access to the courts. Defendants' cross-motion for summary judgment should be **DENIED** in all other particulars.

NOW, THEREFORE, IT IS ORDERED that the Clerk shall serve a copy of the Findings and Recommendation of the United States Magistrate Judge upon the parties. The parties are advised that pursuant to 28 U.S.C. § 636, any objections to these findings must be filed with the Clerk of Court and copies served on opposing counsel within ten (10) days after receipt hereof, or objection is waived.

IT IS FURTHER ORDERED that Plaintiff's Motion to Certify Class is **DENIED.**

DATED this 26th day of February, 1997.

/s/ Leif B. Erickson
United States
Magistrate Judge

RATIONALE

I. BACKGROUND

The subject matter of this action revolves around Plaintiff's attempted written communication with another Montana State Prison inmate, Pat Tracy. In early 1995 Tracy was accused of assaulting correctional officer Galle. Following the assault Tracy was moved to the maximum

security section of Montana State Prison. The assault gave rise to felony criminal charges against Tracy in Powell County, Montana, to which Tracy ultimately pled guilty.

At the time of the assault Plaintiff was an inmate law clerk in the Maximum Security Unit of Montana State Prison. He had previously assisted Tracy in unrelated legal matters. Apparently Tracy requested assistance from Plaintiff, but the law librarian advised him that high security inmates were no longer allowed to visit the Maximum Security Unit. A low security inmate law clerk made arrangements to see Tracy, however Tracy refused to speak to him because the law clerk allegedly had developed a reputation for disclosing information to others.

On February 16, 1995, Plaintiff wrote a letter to Tracy which reads as follows:

> How ya doing? Sorry I haven't wrote before now. I been busy fighting my charges. Finally got everything taken care of. I can't come up to max anymore, the lowside clerks go up there now, that's why I haven't called you out like I used to. I do want to help you with your case against Galle. It wasn't your fault and I know he provoked whatever happened! Don't plead guilty because we can get at least 100 witnesses to testify that Galle is an over zealous guard who has a personal agenda to punish and harass inmates. He has made homo-sexual advances towards certain inmates and that can be brought up into the record. There are petitions against him and I have tried to get the Unit Manager to do something about what he does in Close II, but all that happened is that I received two writeups from him myself as retaliation. So we

> must pursue this out of the prison system. I am filing suit with everyone in Close I and II named against him. So you can use that too!
>
> Another point is that he grabbed you from ~~behind. You tell~~ your lawyer to get ahold of me on this. Don't take a plea bargain unless it's for no more time.
>
> I seen Damie for a little while when I was out. I never came over to Butte much. Lenny is living in lower D still and I don't speak to him much. His sister did something to Ted from what I heard. I don't know what. Well I will write again when I get this thing against Galle finished.
>
> Later. . . .

Defendant Robert Shaw, a correctional officer, intercepted this letter, read it, and gave Plaintiff three disciplinary violation reports for writing and sending the letter. Shaw claimed plaintiff violated Rule 009 (Insolence), Rule 022 (Interference with Due Process Hearings), and Rule 025 (Conduct Which Interferes or disrupts the Security or Orderly operation of the Institution). Defendant Larry Bearley found Plaintiff guilty of violating Rules 009 and 022, and sanctioned him to ten days detention, all suspended. Defendant Mahoney denied Plaintiff's appeal of the disciplinary violations.

In his Complaint, Plaintiff claims that: (1) Defendants' actions in disciplining law clerks based upon the content of their communications violates the First Amendment to the United States Constitution, (2) Defendants' actions abridge the rights of inmates to access the courts by denying them the assistance of an inmate law

clerk, (3) Defendants' actions abridge the rights of inmates to seek a writ of habeas corpus pursuant to 28 U.S.C. § 2254, (4) Defendants' enforcement of disciplinary Rule 009 deprived Plaintiff of his right to due process and his right to free speech, and (5) Defendants' enforcement of disciplinary Rule 022 deprived Plaintiff of his right to due process and free speech.

For his relief Plaintiff seeks an order from this Court which declares (1) disciplinary Rules 009 and 022 unconstitutionally vague and overbroad and in violation of the First and Fourteenth Amendments, and (2) the Defendants' practice of disciplining law clerks based on the content of their advice to other inmates violates the First Amendment. Plaintiff also seeks an injunction which prohibits the Defendants from (10 enforcing Rule 009, (2) enforcing Rule 022, and (3) disciplining inmate law clerks for communications with inmate clients.

II. APPLICABLE LAW

A. Summary Judgment

A party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). On a motion for summary judgment, this Court must determine whether a fair-minded jury could return a verdict for the nonmoving party. *Id.* at 252.

The party seeking summary judgment bears the initial burden of informing the Court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions

on file, together with the affidavits, if any, which it believes demonstrate the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 217, 323 (1986).

Where the moving party has met his initial burden with a properly supported motion, the party opposing the motion "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, at 248. The nonmoving party may do this by use of affidavits (including his own), depositions, answers to interrogatories, and admissions. *Id.* Where the moving party has not met his initial burden the motion should be denied regardless of the nonmoving party's response. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

In evaluating the appropriateness of summary judgment the Court must first determine whether a fact is material; and if so, it must then determine whether there is a genuine issue for the trier of fact, as determined by the documents submitted to the Court.

As to materiality, the applicable substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude entry of summary judgment. Factual disputes which are irrelevant or unnecessary to the outcome are not considered. *Anderson*, at 248.

B. Prison Regulations

"Convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." *Bell v. Wolfish*, 441 U.S. 520, 545 (1979). For example, prisoners retain protections afforded by the First Amendment. *Johnson v. Avery*, 393 U.S. 483 (1969). Regulations impinging on such rights shall be analyzed under the reasonableness standard of *Turner v. Safley*, 482 U.S. 78, 96 L. Ed. 2d 64 (1987).

In *Turner* the Supreme Court held that when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. *Turner*, 482 U.S. at 89, 96 L. Ed. 2d at 79. In accordance with *Turner*, the courts must consider several factors in determining the reasonableness of a prison regulation. First, there must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it. *Turner*, 96 L. Ed. 2d at 79, (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984). Second, the court must consider whether there are alternative means of exercising the rights that remain open to prison inmates, keeping in mind the judicial deference owed to correction officials. *Id.* The third consideration "is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* 96 L. Ed. 2d at 79-80. "Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation." *Id.* at 80. The regulations must not be an "exaggerated response" to concerns in prison. *Id.*

III. DISCUSSION

A. Access to the Courts

It is clear that convicted prisoners have a fundamental right of meaningful access to the courts. *Bounds v. Smith*, 430 U.S. 817 (1977). The right is necessary for inmates to "attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement." *Lewis v. Casey*, 135 L. Ed. 2d 606, 620 (1996). However, "[b]ecause *Bounds* did not create an abstract, free-standing right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is sub-par in some theoretical sense." *Lewis v. Casey*, 135 L. Ed. 2d at 618. "Insofar as the right vindicated by *Bounds* is concerned, 'meaningful access to the courts is the touchstone,' *Bounds*, 430 U.S. at 823, 97 S. Ct. at 1495 (internal quotation marks omitted), and the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." *Lewis v. Casey*, 135 L. Ed. 2d at 618.

While *Lewis v. Casey* deals with claimed inadequacies in a law library and legal assistance program, it nonetheless requires inmates to demonstrate relevant actual injury. In this case Murphy has not shown any actual injury to himself, or that Defendants have hindered his efforts to pursue a legal claim. Significantly, Plaintiff does not even allege that he has a claim to pursue. Instead, his claim is based upon the theory that the fear of discipline impermissibly burdens his right of meaningful access to the courts by its chilling effect on the content of his

written communications with other inmates. For the same reason that an inmate cannot establish relevant actual injury simply by establishing that a library or legal assistance program is sub-par in some theoretical sense, this Court will not permit Plaintiff to establish relevant actual injury simply by claiming that the challenged prison regulations have, in some theoretical sense, a chilling effect on the content of written prisoner communications. Therefore, absent an actual injury Plaintiff lacks standing to pursue a claim of a denial of his right of access to the courts.

Although Plaintiff cannot show any actual injury to his right of access to the courts, he also argues that he can pursue a claim for a denial of access to the courts on behalf of Tracy. However, the cases Plaintiff relies on in support of this theory either involve an inmate who was acting only on his own behalf, or require that the court find that the plaintiff's assistance was the only resource available to the other inmates. *See Gibbs v. Hopkins*, 10 F.3d 373, 378-79 (6th Cir. 1993) (only resource available); *Vaughn v. Trotter*, 516 F. Supp. 886, 891-92 (M.D. Tenn. 1980) (must show absence of alternatives for other inmate); *Johnson v. Avery*, 393 U.S. 483, 490 (1969). The Court is not aware of any controlling or persuasive legal authority for asserting a right of access to the courts on behalf of a third party absent the showing of other required circumstances. The Court acknowledges that the Ninth Circuit has employed broad language with regard to an inmate's right of access to the courts on "behalf" of other inmates. *Navarette v. Enomoto*, 536 F.2d 277, 280 (9th Cir. 1976), *rev'd on other grounds Procunier v. Navarette* 434 U.S. 555 (1978). However, although the plaintiff in

Navarette was a law librarian, the facts of the case indicate that the plaintiff was acting only on his own behalf.

By his communication to Tracy, Plaintiff was not attempting to pursue any legal claims or defenses on his own behalf. Rather, he was allegedly attempting to assist Tracy in formulating a defense to criminal charges filed against Tracy. Accordingly, the Court finds that Plaintiff lacks standing to assert Tracy's access to the courts claim. *See, e.g. Tuggle v. Barksdale*, 641 F. Supp. 34, 36 (W.D. Tenn. 1985) ("one inmate does not have the standing to assert the separate constitutional right of another inmate to [his] access to the courts[.]"); *Gassler v. Rayl*, 862 F.2d 706, 707-708 (8th Cir. 1988); *Schenck v. Edwards*, 921 F.Supp. 679, 682-683 (E.D. Wash. 1996).

B. First Amendment

In addition to Plaintiff's claim of denial of access to the courts, he asserts that Defendants have interfered with his First Amendment right to assist other inmates. Although a prisoner does not have the full constitutional rights of a person who is not incarcerated, it is clear that a

> prison inmate retains those First amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.

Pell v. Procunier, 417 U.S. 817, 822 (1974). Accordingly, prison administrators may impose restrictions on the freedom of speech, but the restrictions must be "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987).

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The Ninth Circuit Court of Appeals has held that "prison officials may not punish an inmate merely for using 'hostile, sexual, abusive or threatening' language in a written grievance." *Bradley v. Hall*, 64 F.3d 1276, 1282 (9th Cir. 1995).[1] The court went through the four-part analysis set forth above as required by *Turner v. Safley*, 482 U.S. 78 (1987) to determine if the prison regulations at issue in *Bradley* unconstitutionally infringed upon the inmate's right to petition the government for redress of grievances. The court determined that punishing an inmate for the content of his written grievance was an exaggerated response to prison concerns. *Bradley*, 64 F.3d at 1281. The court left open the possibility that there may be situations in which prison officials may properly discipline inmates for criminal threats contained in written grievances. *Id.*

Without the aid of affidavits of prison personnel or any other supporting material Defendants argue, in conclusory fashion, that the confiscation of the offending letter and disciplinary action against Plaintiff are both rationally related to a legitimate penological interest. Moreover, the communication at issue is between inmates

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[1] In *Bradley* the court analyzed the facts primarily under the right of access to the courts and the First Amendment right to petition the government to redress grievances. *Bradley* 64 F.3d at 1280. However, freedom of speech issues were also implicated, *Id.* at 1281, and the analysis of *Turner* is the same. *See Rios v. Lane*, 812 F.2d 1032 (7th Cir. 1987). Although in this case Plaintiff's right to petition the government for redress of grievances is not implicated, his First Amendment rights of freedom of expression and association are implicated by Defendants' actions.

in the highest security section of Montana State Prison where the need for strict control is utmost.

Plaintiff, of course, argues to the contrary that Defendants have failed to show that the conduct at issue is rationally related to a legitimate penological objective. Plaintiff is an inmate law clerk and the subject of his letter concerns advice to another inmate regarding a defense to felony assault charges. The Court is faced with the question of determining whether the mere fact that the letter purportedly involves advice to another inmate regarding a defense to felony charges entitles the communication to greater protection. *See Rizzo v. Dawson*, 778 F.2d 527, 531 (9th Cir. 1985) (recognizing First Amendment right to assist another inmate in vindicating civil rights).

While the district court in *Bradley* resolved the matter on summary judgment it also had the benefit of affidavits of prison personnel, correctional institution experts, and inmates. Defendants have not presented any affidavits on the issue of the relationship between the regulations and the alleged penological interests of the Montana State Prison. Consequently, the Court finds that Defendants have not met their burden of establishing the absence of a genuine issue of material fact, and the Court is unable to determine if the challenged regulations permissibly infringe upon Plaintiff's First Amendment rights under the *Turner* standard set forth above. Therefore, their motion should be denied. *See Little v. Liquid Air Corp.*, 37 F.3d 1069 (5th Cir. 1994), supra.

Similarly, Plaintiff has not met his initial burden in his motion to show the absence of a genuine issue. Therefore, he is not entitled to summary judgment.

C. Overbreadth and Vagueness

Plaintiff contends the regulations at issue are both vague and overbroad. In his Complaint, Plaintiff presents his legal cause of action on the basis that the regulations violate both his First Amendment rights and his due process rights. Compl. at 4-5. However, in his prayer for relief Plaintiff seeks a declaratory judgment only on the basis of his First Amendment rights. Compl. at 5. Similarly, Plaintiff's arguments on this issue in his briefs on the pending motions are based only on the First Amendment theory. He states that he "has not claimed the loss of a liberty interest nor a denial of due process as his basis for standing . . . [, but instead he] alleges abridgment of First amendment rights to free speech and access to the courts." Plaintiff's Reply at 5. Defendants, on the other hand, argue for summary judgment in their favor based on both the First Amendment and due process theories.

The Court acknowledges that the vagueness and overbreadth arguments can fall under either the First Amendment, or the due process clause, and the legal theories are independent of each other. *See Rios v. Lane*, 812 F.2d 1032, 1039 (7th Cir. 1987) (completely distinguishable and independent theories). Accordingly, the Court will address the theories separately.

1. Due Process

As a threshold issue, Defendants argue that in light of the "atypical and significant hardship" analysis under *Sandin v. Conner*, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995), Plaintiff has no standing to complain about the sanction imposed against him for violation of the subject regulations, and therefore he has no due process interest to assert. However, the principles expressed in *Sandin* on which Defendants rely are not controlling in the facts of this case. The specific question addressed by *Sandin* was under what circumstances do "state prison regulations afford inmates a liberty interest protected by the Due Process Clause." *Sandin*, 115 S. Ct. at 2295. In addition to the "atypical and significant hardship" analysis, the Court also addressed the question of whether the facts of the case invoked protections provided by the Due Process Clause "of its own force[.]" *Sandin*, at 2300, 2302. Therefore, even under the authority of *Sandin*, the court must additionally consider whether the Due Process Clause, "of its own force," provides protections to the inmate. *See Higgason v. Farley*, 83 F.3d 807, 809 (7th Cir. 1996). *See also El-Amin v. Tirey*, 817 F. Supp. 694 (W.D. Tenn. 1993) (analyzing prison regulations under the Due Process Clause); *Wolfel v. Morris*, 972 F.2d 712 (6th Cir. 1992) (analyzing prison regulations under the Due Process Clause).

In this case, Plaintiff does not argue that he has a liberty interest arising from the regulations in question. Rather, Plaintiff argues that the regulations deprived him of his rights which arise from the U.S. Constitution. Accordingly, the Court construes Plaintiff's claims as

being presented on the basis that he has certain protections of his constitutional rights provided by the Due Process Clause of its own force.

Because Defendants argue that they are entitled to summary judgment based only on the "atypical and significant bardship" analysis of *Sandin*, they have not presented any legal argument in support of summary judgment based on the Due Process Clause of its own force. Accordingly, Defendants have not met their initial burden and are not entitled to summary judgment on their due process theory.

2. First Amendment

Plaintiff contends that the subject regulations are both vague and overbroad in violation of the First Amendment. Although these legal theories require a particular analysis, *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).

> the concepts of "overbreadth" and "vagueness" in the jurisprudence of the First Amendment were devised in order to prevent the slightest discouragement of free speech, and therefore have only limited relevance to a sphere where the right of free speech is limited.

Ustrak v. Fairman, 781 F.2d 573, 580 (7th Cir. 1986) (applying concepts in challenge to prison regulation). Ultimately, the Court must still find that the subject regulations violate Plaintiff's First Amendment rights after analyzing the four-part test set forth in *Turner v. Safley*, 482 U.S. 78 (1987). *See Rios v. Lane*, 812 F.2d 1032,

1035-36 (7th Cir. 1987) (inmate retains only those First Amendment rights that are not inconsistent with legitimate penological objectives).

However, in addressing the analysis under *Turner* set forth above, Plaintiff has not met his initial burden of showing the absence of any genuine issue of material fact. Accordingly, the Plaintiff's motion should be denied. *See Little v. Liquid Air Corp.*, supra.

Similarly, as indicated above, Defendants have not met their initial burden of establishing that the regulations are reasonably related to legitimate penological interests under *Turner*. Accordingly, Defendants are not entitled to summary judgment.

D. Certification as a Class Action

Plaintiff seeks certification of this action as a class action under Fed. R. Civ. P. 23. Plaintiff argues that the proposed class consists of "all current and future inmates who may rely on inmate law clerks or 'jailhouse lawyers' and all current and future inmates who are inmate law clerks or 'jailhouse lawyers'." Plaintiff's Motion to Certify Class at 1.

The Court finds that Plaintiff's motion suffers from two defects. First, Plaintiff is not currently a member of the class of inmates who may rely on other inmate law clerks because none of his present claims are based on his reliance on another inmate law clerk. Article III of the U.S. Constitution, which requires an actual "case or controversy," also requires that when a suit takes the form of a class action, the named plaintiff must share the same

injury. *DePree v. United States*, 559 F.2d 1151, 1153 (9th Cir. 1977). "A litigant must be a member of the class which he or she seeks to represent at the time the class action is certified[.]" *Id.* (quoting *Sosna v. Iowa*, 419 U.S. 393, 403, 95 S. Ct. 553, 559, 42 L. Ed. 2d 532 (1975)). Plaintiff is not presently a member of this class of inmates.

Second, Plaintiff has not established that the class of current and future inmates who are inmate law clerks or "jailhouse lawyers" is so numerous that joinder of all members is impracticable as required by Fed. R. Civ. P. 23(a)(1). Defendants indicate that there are presently only about 6 inmate law clerks at the Montana State Prison. Defendants' Response at 3.

Accordingly, Plaintiff has not satisfied the requirements for the class certification of this action and his motion is denied.

cc: Jeffrey T. Renz
Attys. for Dept. of Corrections

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEVIN MURPHY, Plaintiff-Appellant, v. ROBERT SHAW, LARRY BEARLEY, MICHAEL MAHONEY, MYRON BEESON, and RICHARD S. DAY, Defendants-Appellees.	)	No. 97-35989 D.C. No. CV-95-00062-CCL ORDER (Filed Jan. 7, 2000)

Before: B. FLETCHER, REINHARDT and THOMAS, Circuit Judges

The panel has voted to deny appellees' petition for rehearing and to reject the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

February 16, 1995

Dear Pat:

How ya doing? Sorry I haven't wrote before now. I been busy fighting my charges. Finally got everything taken care of. I can't come up to max anymore. The lowside clerks go up there now. that's why I haven't called you out like I used to. I do want to help you with your case against Galle. It wasn't your fault and I know he provoked whatever happened! Don't plead guilty because we can get at least 100 witnesses to testify that Galle is an over zealous guard who has a personal agenda to punish and harrass [sic] inmates. He has made homosexual advances toward certain inmates and that can be brought up into the record. There are petitions against him and I have tried to get the Unit Manager to do something about what he does in Close II, but all that happened is that I received two writeups from him myself as retaliation. So we must pursue this out of the prison system. I am filing a suit with everyone in Close I and II named against him. So you can use that too!

Another poiont [sic] is that he grabbed you from behind. You tell your lawyer to get ahold [sic] of me on this. Don't take a plea bargain unless it's for no more time.

I seen Damie for a little while when I was out. I never came over to Butte much. Lenny is living in lower D still and I don't speak to him much. His sister did something to Ted from what I heard. I don't know what. Well I will write again when I get this thing against Galle finished.

Later. . . .

Murph

From Inmate Kevin Murphy
Legal Clerk

To: Pat Tracy
Max
Insti. Mail

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

KEVIN MURPHY, individually an on behalf of other persons similarly situated Plaintiffs, -v- ROBERT SHAW, et al., Defendants.	No. CV 95-62-H-CCL AFFIDAVIT OF PAT TRACY

STATE OF MONTANA)
:ss
County of Powell)

Before the undersigned, a notary public for the State of Montana, personally appeared Pat Tracy, who, having been duly sworn, on his oath deposes and says that this affidavit is made on his personal knowledge, and that if he were to appear as a witness in the above-captioned matter, he would competently testify as follows:

1. I am an inmate confined at Montana State Prison, Deer Lodge, Montana.

2. I am from Butte, Montana.

3. I am housed on the high security side of Montana State Prison and was housed there in late 1994, early 1995.

4. On August 11, 1994, I was charged by information with felony assault.

5. On August 11, 1994, I asked for my own attorney.

6. On August 25, 1994, I was appointed counsel.

7. I requested the legal assistance of Kevin Murphy, an inmate law clerk through Dave Beatty, prison librarian, through prison kites, and by passing the word to Murphy.

8. I wanted Kevin Murphy's assistance with those charges pending against me and with framing the issues.

9. Kevin Murphy has provided me with legal assistance many times dating back to the mid-1980's including an appeal to the 9th circuit.

10. I was told that I could only see the low side law clerks. A low side law clerk came to speak with me. I refused to talk to him because this law clerk had a reputation for disclosing information obtained from meeting with inmates.

11. I never received the February 16, 1995 letter sent by Kevin Murphy to me and did not get a copy of it until June 1996.

12. To avoid the risk of a persistent felony offender enhancement by the County Attorney, I pled guilty to felony assault.

FURTHER AFFIANT SAYTH NOT.

DATED this 12th day of July, 1996.

/s/ Pat Tracy
Pat Tracy